No. 10506

In the United States Circuit Court of Appeals for the Ninth Circuit

GEORGE A. KOCH, EXECUTOR OF THE ESTATE OF ADOLPH J. KOCH, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
CARLTON FOX,
Special Assistants to the Attorney General.

INDEX

CITATIONS

571165—44——1

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10506

George A. Koch, Executor of the Estate of Adolph J. Koch, Deceased, petitioner

v.

Commissioner of Internal Revenue, respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The report of the Tax Court consisting of its memorandum findings of fact and opinion is unreported. (R. 25–42.)

JURISDICTION

The petition for review involves a deficiency in federal estate taxes in the amount of $22,544.18. (R. 25.) On May 22, 1941 (R. 4, 23), the Commissioner of Internal Revenue mailed the taxpayer a notice of deficiency of estate taxes determined by him in the amount aforesaid (R. 7–18). On June 28, 1941 (R. 1, 18), within 90 days after the mailing of the notice aforesaid, the taxpayer filed a petition with the United

States Board of Tax Appeals (now the Tax Court of the United States) for redetermination of that deficiency under the provisions of Section 272 of the Internal Revenue Code (R. 3–18). And on August 16, 1941 (R. 2, 22), the taxpayer filed an amended petition (R. 18–22). On September 3, 1941 (R. 2, 24), the Commissioner filed his answer to the petition and amended petition (R. 23–34). The final order and decision of the Tax Court redetermining the deficiency in the estate tax in the amount of $22,544.18 was entered April 14, 1943. (R. 3, 42.) The case was brought to this Court by a petition for review (R. 293–300), filed June 29, 1943 (R. 3, 300–301), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTIONS PRESENTED

1. Whether there is evidence to sustain the finding of the Tax Court that transfers by the decedent, aggregating $204,442.51, were made in contemplation of death, within the meaning of Section 811 (c) of the Internal Revenue Code.

2. Whether $79,001.53 of the above mentioned amount representing the value of cash and property transferred in trust was includible under Section 811 (d) (1) of the Internal Revenue Code, because the decedent had reserved the power to alter, amend, revoke or terminate the transfer.

STATUTES AND REGULATIONS INVOLVED

These will be found in the Appendix, *infra.*

STATEMENT

The facts as found by the Tax Court may be summarized as follows:

The taxpayer's decedent, Adolph J. Koch, a retired resident of San Jose, California, died there on June 29, 1939, at the age of 84. His wife had predeceased him.[1] The decedent was survived by one child, a son, George A. Koch, and two grandsons, Kenneth, the only child of George, and Ralph J. Swickard, the son of the decedent's daughter, Hilda, who died shortly after Ralph's birth. (R. 26.) Ralph was raised by the decedent and his wife and lived with them until he was 17 or 18. The decedent was anxious that he should go to Stanford University where Kenneth was and on September 21, 1938, provided Ralph with $500 for tuition. (R. 26–27.)

The decedent was a man of considerable means. In 1913 he gave George some flats of the value of about $30,000 as a wedding gift; between then and 1930 he gave George at least $10,000 additional in cash, and in 1930 $40,000. In 1931 or 1932 he stated to his attorney that he planned to give George $100,000 additional, but did not do so because George was in financial difficulties and might have lost it to his creditors. Instead, on the advice of the attorney, the decedent made a will, dated February 23, 1932, in which he declared a spendthrift trust in favor of George.[2] However, after George's discharge in bankruptcy and

[1] She had died five or six years previously. (R. 45.)

[2] The will is not in evidence and the record does not disclose what, if any other, gifts were therein made.

on July 25, 1935, the decedent executed another will which, with certain codicils, was admitted to probate upon his death. Therein the decedent, after making certain relatively small bequests, gave the residue to George and Ralph in equal shares. George's share was payable to him directly, but Ralph's was placed in a trust for him, George being named the sole trustee to act without bond. George was also named as the executor.[3] (R. 27–28.) The testamentary trust provided that the trustee should use so much of the income as was necessary for Ralph's support, maintenance, and education, and that when Ralph reached the age of 21 one-fourth of the corpus should be delivered to him. The trustee was empowered to deliver the balance of the corpus to Ralph when he reached 25. The trust was to terminate when Ralph reached 30, at which time he was to receive the balance of the corpus, if any. Certain changes were made in the trust by a codicil dated March 3, 1937, whereby the dates of the distribution of the corpus to Ralph were advanced.[4] (R. 28, 280–286.)

On December 20, 1938, the decedent made substantially equal *inter vivos* gifts to George and Ralph of cash and securities.[5] The value of the gift to George

---

[3] The will, as well as the codicils, is a part of Joint Exhibit A–1. (R. 269–290.)

[4] The testamentary trust, as well as the codicil of March 3, 1937, made elaborate provision for the distribution of the corpus to George and Kenneth in the event that Ralph died without leaving issue before reaching the age at which the corpus was distributable to him. (R. 272–273, 282–285.)

[5] For an explanation of the difference in the amounts, see George's testimony. He said it lay in the market value of some bonds. (R. 159–161.)

was $79,290.98, and of that to Ralph $79,001.53. Similarly as the gifts made by the decedent's will, the *inter vivos* gift to George was outright and the gift to Ralph was placed in trust with George as trustee.[6] (R. 28–29.)

During the month of January, 1939, the decedent made further gifts directly to both George and Ralph of cash and property, to George of a value of $23,150 and to Ralph of the value of $21,000.[7] (R. 29.)

The transfers made in 1938 and 1939, aforesaid, aggregated $204,442.51. (R. 25.) The decedent retained the balance of his property of a value of $142,605.39 until his death and it then passed under his will. (R. 30.)

The Tax Court further found, as regards the decedent's health, that about five or six years prior to his death he was struck by an automobile causing injury to the right hip. Thereafter his side bothered him. Prior to the accident, his health had been good; he seldom required the attendance of a physician. On May 18, 1938, the decedent had a paralytic stroke and for some time thereafter was unable to use his left

[6] This trust is also a part of Joint Exhibit A–1. (R. 288–289.) Its provisions are substantially similar to those of the testamentary trust. However, the income therefrom was to be paid to Ralph until he reached 25, at which time the corpus was to be distributed to him. The trust also provided for the distribution of the corpus to George and Kenneth if Ralph died before he reached the age of 25 without leaving issue. (R. 289.)

[7] The difference in the amount of these gifts was also explained by George in his testimony. He stated that the decedent gave him $2,200 worth of bank stock to offset the gift of his automobile to Ralph which he said he wanted Ralph to have, directing George to put it into Ralph's name. (R. 160–161.)

hand and lower extremity. He had fallen while alone in his bathroom. His condition improved, however, and his limp "cleared up almost entirely." The decedent was independent, often refusing proffered assistance and at times walked without his cane. (R. 30–31.)

After his illness in 1938, the decedent spent most of his time sitting on the porch of his home or in the front room looking out of the window. He usually retired early and got up early. He was always in good spirits and never talked about his death. He was a director in a building and loan association and missed only two of the monthly directors' meetings. (R. 31.) From June 22, 1938, until his death the decedent did not require the services of a doctor, except for the treatment of an inflamed eye. The cause of his death was peritoneal hemorrhage caused by another fall in the bathroom on the morning of his death. Contributing causes were chronic interstitial nephritis and cystic degeneration of the right kidney, and senility. The contributory causes, except senility, were, however, revealed only by an autopsy and the decedent had never been treated for them. (R. 32.)

The Commissioner determined that the gifts which the decedent had made in 1938 and 1939 were made in contemplation of his death and the Tax Court found that they were so made.[8] (R. 33.)

[8] The Commissioner accordingly determined a deficiency in estate tax against the decedent's estate of $22,544.18. (R. 15, 25.) He also determined that the transfer in trust made by the decedent on December 20, 1938, for the benefit of Ralph, of property valued at $79,001.53, heretofore referred to, was includible in the de-

SUMMARY OF ARGUMENT

I

The contemplation of death issue

1. *Applicable Principles of Law.*—By including in the decedent's gross estate the value of property transferred in contemplation of his death, Congress intended to reach substitutes for testamentary disposition. Hence, the Supreme Court in *United States* v. *Wells,* held that the differentiating factor must be found in the decedent's motive, which must be of the sort that leads to testamentary disposition, and not in expectation or fear of immediate death. Before the Tax Court, the burden of proof was upon the decedent's representatives to show that the transfers in question were *not* made in contemplation of death. The taxpayer has not met the burden merely by showing that one of the decedent's motives was associated with continued life. The trier of the fact is free to find from all the evidence whether the dominant motive for the transfer was to make a substitute for a testamentary disposition, even though the

cedent's gross estate under the provisions of Section 811 (d) of the Internal Revenue Code since the decedent had reserved the power to alter, amend, revoke, or terminate said trust. (R. 9–10.) Although the Tax Court found that in this trust "no power to change, alter or amend the trust was reserved in the settler" (R. 29), and this is literally true because the decedent did not expressly reserve such power, nevertheless, the power was retained in view of the provisions of Section 2280 of the California Civil Code, which provides that, unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trust or by writing filed with the trustee.

evidence discloses statements of the decedent indicating that he was actuated by motives associated with life. On such review, the appellate court may not substitute its own finding for that made by the Tax Court. It is well settled that the question whether a given transfer was made in contemplation of death is purely one of fact, and that on that question the finding of the trier is conclusive if there is evidence to sustain it.

2. *An analysis of the facts.*—(a) The taxpayer's contention is without merit that the decision of the Tax Court is founded upon an erroneous interpretation of the term "made in contemplation of death," as used in the statute, in that the Tax Court applied a criterion of "general expectation of death" rather than "a particular concern, giving rise to a definite motive." The Tax Court sought to find the decedent's motive for the transfers and concluded, upon a review of all the evidence, that his motive was to make a substitute for testamentary disposition.

(b) Nor does the fact that decedent did not expressly make the transfer in trust to his grandson Ralph irrevocable, as required by California statute in order to make it so, indicate that he intended to make it irrevocable in order to control the corpus and its further disposition, as the taxpayer contends. There is no evidence whatever to show that the decedent knew the transfer would be revocable if he did not expressly make it irrevocable.

(c) The taxpayer's remaining contention is that the Tax Court should have reached a different conclusion on the evidence. Specifically, the taxpayer contends

that the Tax Court should have found the decedent was solely motivated by life motives. The Tax Court was not bound by decedent's declarations of purpose. It carefully analyzed the evidence, including the statements attributed to the decedent upon which the taxpayer relies to establish life purposes, and concluded that the decedent was motivated by a purpose to make substitutions for testamentary disposition. There was ample evidence to sustain its finding. The decedent was 84 years of age and had retired. His wife was dead. He was suffering from a disability which was the result of a severe injury to his right hip and extremity sustained some years before. The decedent had had a paralytic stroke a number of months before the transfers were made, from which, however, he had made a good recovery. He had originally left his property by will executed some years before his death in equal shares to his only son and to a grandson, the only child of his daughter who had died in childbirth. Within six months of his death, the decedent transferred about two-thirds of his property to them in the same proportion and in substantially the same manner as he had given it to them in his will, that is, he gave his son George his part outright and placed Ralph's part in trust until he should reach a given age.

II

The issue regarding the decedent's power to revoke the transfer in trust to the decedent's grandson

Section 811 (d) (1) of the Internal Revenue Code provides for the inclusion in the gross estate of property to the extent of any interest therein which was at

the decedent's death subject to a power of revocation, etc. The provision as it existed in the law prior to 1936 was amended by the Revenue Act of 1936 so as to provide that such inclusion should occur "without regard to when or from what source the decedent acquired such power." The occasion for the amendment was the decision of the Supreme Court in *White* v. *Poor,* and the intention of Congress in so amending the law was to make that decision ineffective for the future; otherwise, the amendment was considered to have been merely declaratory of existing law, and it was so in fact. It follows that the existence at death of a power to revoke the transfer in trust to Ralph, fell within the ambit of the statute, although such power existed only because the transfer contained no express provision making it irrevocable, as required by state statute. If, however, it be thought that Congress intended that the amendment should apply only prospectively then it applies in all cases arising subsequent thereto, and not alone to such as are similar to that prevailing in *White* v. *Poor.*

ARGUMENT

I

There is evidence to sustain the Tax Court's finding that the transfers in question were made by the decedent in contemplation of death

1. The applicable principles of law

So far as material here Section 811 of the Internal Revenue Code (Appendix, *infra*) provides that the value of the decedent's gross estate shall be determined

by including therein the value at the time of his death of all property—

> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of * * * his death, * * *. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such [adequate and full consideration in money or money's worth] consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter.

In construing the term "made in contemplation of death" as used in Section 402 (c) of the Revenue Act of 1918, which is substantially similar to the contemplation of death provision of Section 811 (c) of the Internal Revenue Code, the Supreme Court, in *United States* v. *Wells,* 283 U. S. 102, 116–117, pointed out that the dominant purpose of Congress was to reach substitutes for testamentary dispositions and thus prevent evasion of the estate tax, citing *Nichols* v. *Coolidge,* 274 U. S. 531, 542, and *Milliken* v. *United States,* 283 U. S. 15. In holding that Congress had the power to require the inclusion in the decedent's gross estate of transfers "made in contemplation of death," the Supreme Court in the *Milliken* case had said (p. 23):

> It is sufficient for present purposes, that such gifts are motivated by the same considerations as lead to testamentary dispositions of property,

> and made as substitutes for such dispositions without awaiting death, when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation, of death.

Hence, the Court in the *Wells* case, immediately after citing the *Milliken* case (which had been decided by it only a little more than a month before), said (p. 117):

> As the transfer may otherwise have all the indicia of a valid gift *inter vivos,* the differentiating factor must be found in the transferor's motive. Death must be "contemplated," that is, the motive which induces the transfer must be of the sort *which leads to testamentary disposition.* [Italics supplied.]

And, since the determining factor is the existence of a motive of *the sort which leads to testamentary disposition,* and not expectation or fear of immediate death, the Court in the *Wells* case said (p. 118) that the statute was not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is "near at hand." The Court therefore disapproved the construction which the Court of Claims had put upon the statute (*Wells* v. *United States,* 39 F. 2d 998, 1008), namely that it was only where the transfer of property by gift was immediately and directly prompted by the expectation of death that property so transferred became amenable

to the burden—that it was only where contemplation of death was the motive *without which* the conveyance would not have been made that a transfer may be subjected to the tax, "that is, the expectation of death must be the direct, specific, and immediate animating cause of the transfer."

It is important to note, however, that, while the *Wells* case made the issue entirely one of fact, it dealt only with the construction of the statute and not with the burden of proof, which rests upon the taxpayer to establish to the satisfaction of the trier of fact that the transfer was *not* made in contemplation of death. This burden is cast upon the taxpayer not only because he has to overcome the presumption of the correctness of the Commissioner's determination that the transfer was made in contemplation of death, but also because the statute expressly provides that a transfer shall be presumed to have been made in contemplation of death where it is made, as here, within two years of death. It is now well settled that, in order to sustain the burden, the decedent's representatives must prove by a preponderance of the evidence that the dominant motive for the gift was one connected with life. *Wickwire* v. *Reinecke,* 275 U. S. 101, 105; *Niles Bement Pond Co.* v. *United States,* 281 U. S. 357, 361; *Smails* v. *O'Malley,* 127 F. 2d 410, 412 (C. C. A. 8th); *Oliver* v. *Bell,* 103 F. 2d 760, 763 (C. C. A. 3d); *McGrew's Estate* v. *Commissioner,* 135 F. 2d 158, 160 (C. C. A. 6th).

Moreover, the statute requires the inclusion in the gross estate of the value of all transfers made in

"contemplation of death," not merely those made "solely" in such contemplation, and, as we have said, in the *Wells* case the Supreme Court expressly disapproved the theory of the Court of Claims in the case that it must be the motive "without which" the transfer would not have been made. As a matter of fact, gifts are rarely induced by a single undiluted motive. Mixed motives induce the making of most of them, and it frequently happens that explanations clash because some of these motives are "associated with life" and others with death. 1 Paul, Federal Estate and Gift Taxation, par. 6.06, pp. 252–253. As Mr. Justice Stone, now Chief Justice Stone, pointed out in his dissenting opinion in *Heiner* v. *Donnan,* 285 U. S. 312, 342–343:

> The donor of property which would otherwise be subject to heavy taxes at his death does not usually disclose his purpose in making the gift, even if he does not conceal it. He may not, and often does not, analyze his motives or determine for himself whether his dominating purpose is to substitute the gift for a testamentary disposition which would subject it to the tax, see *Milliken* v. *United States, supra,* p. 23; *United States* v. *Wells,* 283 U. S. 102, or whether it is so combined with other motives as to preclude its taxation, even though in making it the donor cannot be unaware that he, like others, must die and that his donation will, in the natural course of events, escape the tax which will be imposed on his other property passing at death. See *United States* v. *Wells, supra.* The difficulty of searching the motives

> and purposes of one who is dead, the proofs of which, so far as they survive, are in the control of his personal representatives, need not be elaborated.

Hence, since whether a given transfer is made in contemplation of death depends upon the dominant motive for making the transfer, it does not suffice for the taxpayer merely to show that one of the decedent's motives was a life motive. The taxpayer must show that the decedent's dominant motive was one connected only with life, and he fails to do this where the evidence is such as to warrant a conclusion that he was also actuated by a purpose to make a substitute for testamentary disposition. If such a purpose exists and motivates the decedent in making the transfer, it matters not what other motive or motives associated with continued life may also have motivated him, the transfer is, despite the existence of such other motive or motives, made in contemplation of death within the meaning of the statute, and it is within the province of the trier of the fact so to find. In affirming a decision of the District Court which had directed a verdict for the Collector of Internal Revenue, the Circuit Court of Appeals for the Second Circuit in *First Trust & Deposit Co.* v. *Shaughnessy,* 134 F. 2d 941, certiorari denied, October 1, 1943, said that (p. 941):

> To make good that claim [that the transfer there in question was not made in contemplation of death] they [the executors of the decedent's will] must not only bring forward some evidence that Ballard [the decedent] did not make the gift in contemplation of death, *but they*

> *must carry the burden of proof on that issue: a duty which comprises more than the duty imposed by the presumption.* The only question therefore was whether reasonable persons might have concluded from all the evidence that Ballard had not made the gift "in contemplation of death"; although it is true that upon that issue the plaintiffs are entitled to every intendment in their favor [since the verdict had been directed against them]. [Italics supplied.]

It follows that the taxpayer has not carried the burden of proof if his evidence establishes to the satisfaction of the trier only that a diversity of motives actuated the transfer, one of which was to make the gift as a substitute for a testamentary disposition of the property. This conclusion is not only not at variance with the *Wells* case, it is compelled thereby. Otherwise, what was there said as to the purpose of Congress to prevent avoidance of the tax and the necessity of construing the statute so as to accomplish that purpose is without apparent application.[9] Cf. *Anneke* v. *Willcuts,* 1 F. Supp. 662 (Minn.).

[9] It has been held that the transfer is taxable if the purposes associated with death form a substantial although a less compelling part of the motive. *Farmers' Loan & Trust Co.* v. *Bowers*, 98 F. 2d 794 (C. C. A. 2d), certiorari denied, 306 U. S. 648, rehearing denied, 308 U. S. 634; *Tait* v. *Safe Deposit & Trust Co. of Baltimore*, 74 F. 2d 851 (C. C. A. 4th). Certiorari was denied in *Farmers' Loan & Trust Co.* v. *Bowers*, *supra* (known as the *Astor* case), although conflict was asserted between it and the decision of the Circuit Court of Appeals for the Third Circuit in *Denniston* v. *Commissioner*, 106 F. 2d 925. The decision of the Circuit Court of Appeals for the Second Circuit has never successfully been challenged. See also the decision of the Circuit Court

Indeed, the Supreme Court has apparently recognized that the effect of the *Wells* case is to cast such burden upon the taxpayer. For in *McCaughn* v. *Real Estate Co.,* 297 U. S. 606, 607, the Court sustained a finding of the District Court that the transfer was made in contemplation of death, although the plaintiffs had adduced evidence showing that the decedent's purpose in making it was "to conserve the estate against mistakes, errors of judgment or inexperience of its beneficial owners." See *Land Title & Trust Co.* v. *McCaughn,* 7 F. Supp. 742 (E. D. Pa.). The Supreme Court sustained the finding because, as it said (p. 607), in the trial court's view, the plaintiffs had failed to show that the motive which induced the transfer, whatever it was, was not of the sort which leads to testamentary disposition, and, consequently had failed to meet the burden of proof placed upon them by the statute. It will be observed that, as the Supreme Court said (*loc. cit.*), the District Court had (similarly as the Tax Court here (R. 38–40)), concluded that the decedent's motive was "not in the least inconsistent with an intention to make its [the] transfer a substitution for testamentary disposition." In other words, despite the fact that there was evidence, which was not directly contradicted, that such purpose existed as a motivating factor, the trier was deemed to be free from all the evidence to find

---

of Appeals for the Second Circuit on the first appeal. *Bowers* v. *Farmers' Loan & Trust Co.*, 68 F. 2d 916, certiorari denied, 293 U. S. 565, 296 U. S. 649, 299 U. S. 582, which forms the basis of the decision of the Circuit Court of Appeals for the Second Circuit on the second appeal.

that death was contemplated. And this was so, as the Supreme Court further pointed out, even though the trial court had also expressly found (p. 607) that the transfer was not made "under any consciousness or belief or apprehension that death was imminent." This left the finding to be sustained virtually alone on evidence which showed that at the age of 78, within two years of death, the decedent, a physician, had made a transfer of his property in trust for the benefit of his children and their wives and descendants valued at upward of $670,000.

The same principle was applied by the Circuit Court of Appeals for the Eighth Circuit in *Smails* v. *O'Malley, supra,* p. 414, where the court held that the written declaration of the decedent that she did not want to be burdened with "looking after business matters," did not, as the appellants there contended, compel the inference that she must be held not to have made the gifts in contemplation of death. Similarly, in *Turner* v. *Hassett,* 37 F. Supp. 996, 998 (Mass.), the District Judge found the decedent's transfer to have been made in contemplation of death, saying that he was not satisfied upon all the credible evidence that the decedent's asserted motives were the controlling motives, one of these being—

> because he thought, for one thing, it would be a good thing for Mrs. Morgan to learn how to handle securities, and for another thing he wanted to make a gift to her, as far as he could, because he understood that the gift tax was going to be increased and he wanted to take advantage of the time before then.

See, also *Oliver* v. *Bell, supra,* p. 763. The same principle has also been applied by the Supreme Court in other fields of the tax law where purpose is the factor which determines the fall of the tax. See *Helvering* v. *Chicago Stock Yards Co.,* 318 U. S. 693, 699, where it was said that it is sufficient if the purpose to avoid surtax upon the corporation's shareholders "induced, or aided in inducing," in that case, the continuance of the practice of accumulating earnings and profits.

It is, therefore, pointless for the taxpayer to argue, as he does (Br. 40–42), that the ultimate finding of the Tax Court that the transfer was made in contemplation of death is merely a conclusion of law, or a determination of "mixed law and fact," based on the Tax Court's finding of primary evidentiary or circumstantial facts; that as such it is subject to judicial review, and that, on such review, the court may substitute its own judgment for that of the Tax Court. *Helvering* v. *Tex-Penn Co.,* 300 U. S. 481, is not authority for that proposition. See *Dobson* v. *Commissioner,* decided by the Supreme Court December 20, 1943 (1944 C. C. H., par. 9108). Moreover, this Court denied a similar contention of the Government in *Commissioner* v. *Cecil B. DeMille Productions,* 90 F. 2d 12, certiorari denied, 302 U. S. 713. And, in *J. M. Perry & Co.* v. *Commissioner,* 120 F. 2d 123, this Court specifically held, as against the taxpayer's contention, that such an ultimate finding is a pure finding of fact. It is true that these cases involved the section which imposes the penalty tax upon corporations accumulating earnings and profits for the purpose of

enabling their shareholders to avoid surtaxes, but, as has already been stated, the taxability in such cases likewise depends upon purpose, namely, the purpose of the corporation in making its accumulations.

In any event, it is now well settled that the question whether a given transfer was made in contemplation of death is purely one of fact, and that on that question the finding of the trier of fact is conclusive, if there is evidence to sustain it, whether the trier be a court (*McCaughn* v. *Real Estate Co., supra*), or the Board of Tax Appeals (now the Tax Court) (*Colorado Bank* v. *Commissioner,* 305 U. S. 23). See also, e. g., *Flack* v. *Holtegal,* 93 F. 2d 512 (C. C. A. 7th); *Smails* v. *O'Malley, supra; McGrew's Estate* v. *Commissioner, supra.* Cf. *Helvering* v. *Rankin,* 295 U. S. 123, 131–132; *Hulburd* v. *Commissioner,* 296 U. S. 300, 306; *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37, 40; *Palmer* v. *Commissioner,* 302 U. S. 63, 70; *Helvering* v. *Nat. Grocery Co.,* 304 U. S. 282, 294; *Helvering* v. *Lazarus & Co.,* 308 U. S. 252, 254–255; *Helvering* v. *Kehoe,* 309 U. S. 277, 279; *Wilmington Co.* v. *Helvering,* 316 U. S. 164. The error of the appellate court in not limiting its review to determining whether there is evidence to support the finding has again and again, and in no uncertain terms, been condemned by the Supreme Court. Thus, in the *Nat. Grocery Co.* case, *supra,* the Court said (pp. 294–295):

> The Court of Appeals, instead of limiting its review to ascertaining whether there was evidence to support the Board's findings and decision, made on all the evidence, as upon a trial *de novo,* in effect, an independent determination

> of the matters which had been in issue before the Board. The court was without power to do so. *Helvering* v. *Rankin,* 295 U. S. 123, 131–132. To draw inferences, to weigh the evidence and to declare the result was the function of the Board. *Hulburd* v. *Commissioner,* 296 U. S. 300, 306; *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37, 40.

Moreover, as the Supreme Court pointed out in *Helvering* v. *Lazarus & Co., supra,* a finding is conclusive on the courts although the evidence on the subject permits conflicting inferences. To the same effect is *Palmer* v. *Commissioner, supra; Wilmington Co.* v. *Helvering, supra,* pp. 167–168; *Oliver* v. *Bell, supra.* It is of no moment that there may be substantial evidence which would support a contrary finding to that made by the Board.

2. An analysis of the facts

(a) The contention of the taxpayer leaves no doubt, however, that we are here dealing with merely another attempt to induce an appellate court to try a contemplation of death case *do novo.* To be sure, the taxpayer asserts (Br. 21) that the decision of the Tax Court is founded upon an erroneous interpretation of the term "made in contemplation of death," as used in the statute, in that the Tax Court applied a criterion of "general expectation of death" rather than a "particular concern, giving rise to a definite motive." The taxpayer's only iteration of this assertion indicates, however (Br. 24), that it is based solely on the statement in the Tax Court's opinion (R. 41) that "It would be closing our eyes to the

obvious to hold that thoughts of death did not enter into his [the decedent's] mind and motivate the transfers." But this quotation furnishes its own refutation of the taxpayer's contention. General thoughts or expectation of death obviously lose their characteristics as such if they become so specific as to motivate transfers. Indeed, it is this fact which differentiates general thoughts of death from the "contemplation of death" to which the statute refers. This is the rationale of the *Wells* case. It is for this reason that it becomes important to ascertain whether the thought of death has become an activating factor in making the transfer; and that it has become such factor is said to be established if the decedent's purpose is to make a transfer which is in its nature a substitute for a testamentary disposition. The applicable Treasury regulation (Section 81.16 of Regulations 105, promulgated under the Internal Revenue Code (Appendix, *infra*)), recognizes this, for it specifically provides in this connection that—

> A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, *or as a substitute for a testamentary disposition of the property,* or for any other motive associated with death. [Italics supplied.]

There can be no question whatever, we think, that the Tax Court correctly understood the governing principles of law and correctly applied them. This is simply evidenced by its discussion of the principles in their application to the facts. Thus, as regards the test, the Tax Court, in its opinion, said (R. 35):

> "Contemplation of death," as used in the statute, requires that the triers of fact apply a subjective test and attempt to ascertain from the available facts "the state of mind" of a donor whose lips have been sealed by death. *United States* v. *Wells,* 283 U. S. 102.

And, as regards the burden of proof, the Tax Court said (R. 37):

> The burden was on the petitioner to show that decedent's gifts in December, 1938, and January, 1939, were motivated by impulses primarily associated with life. *United States* v. *Wells, supra.*

In turn, the Tax Court took up each of the reasons advanced by the taxpayer for the transfers to both Ralph and George and explained why, in its judgment, these did not satisfactorily explain the gifts (R. 38–40), concluding that (R. 40):

> They [the gifts to George], like the gifts to Ralph, appear rather to have been made as substitutes for and in lieu of testamentary disposition of his property.[10]

Further, the Tax Court discussed the decedent's age and health and, in connection therewith, said (R. 41) that, while it was no doubt true that the decedent was of a jovial disposition and did not discuss death at any length with those with whom he associated,

> he must have known that the sands of life were fast running out, that his life expectancy was short and that it was highly desirable his house be put in order.

---

[10] Hereafter we shall endeavor to show how the Tax Court rationalized the evidence of the decedent's alleged motives with its finding that his dominant motive was the thought of death.

And, in conclusion, the Tax Court said that (R. 41):

> *It would be closing our eyes to the obvious to hold that thoughts of death did not enter into his mind and motivate the transfers.* While age alone is not a decisive test, *Flack* v. *Holtegel, supra,* it may well tip the scales where other facts strongly point to testamentary disposition.[11] [Italics supplied.]

In fact, the entire discussion of the case by the Tax Court shows a painstaking analysis of all the evidence in the case, including the decedent's alleged dominant motives, his age and mental and physical condition.

(b) Another point is made by the taxpayer, namely, that (Br. 9), the trust which the decedent declared for Ralph's benefit, although not expressly made irrevocable, was, nevertheless so, because under Section 2280 of the Civil Code of California (Appendix, *infra*) a trust is revocable unless made expressly irrevocable by the instrument creating it. From this premise the taxpayer argues (Br. 10) that the consequent "retention" by the decedent of the power to revoke "looked to further activity, management and discretion which was necessarily associated with motives of life." While it is not entirely clear what is here meant, we think this means to say that the decedent intentionally failed to include a provision in the trust expressly making it irrevocable in order that he might be in position to revoke it, or effect some

---

[11] As has already been stated, the italicized part of the Tax Court's language here quoted was cited by the taxpayer (Br. 24) as evidencing the fact that the Tax Court applied an erroneous rule of law.

change in the beneficiary, or in his status, or in the status of the property.

But there is no evidence that the decedent's failure to insert a provision in the trust making it irrevocable sprang from that purpose. To bridge this gap in the evidence, the taxpayer suggests that the Tax Court draw an inference that this was the decedent's purpose. Thus, the taxpayer says (Br. 9–10) that it is reasonable to assume, even if the decedent's attorney Johnston was not directed by him to make the agreement irrevocable, that the attorney fully advised the decedent of the legal effect of not specifically making it revocable and that the decedent approved this retention of the power in himself to revoke the agreement at any time. Of course, this Court is without power to draw such inference, even if it were a permissible one, which we submit it is not. It is far more likely that neither the decedent nor his attorney had in mind the provision of Section 2280 and did not apprehend or regard its significance. There is no evidence from which it could be reasonably inferred that the matter of revocation was ever called to the decedent's attention or considered by him, or that the reservation of a right to revoke gave him the least concern; and, in any event, the reservation of a right to change one's mind would not alter the character of a gift otherwise made in contemplation of death.

(c) Aside from the foregoing assertions of the misapplication by the Tax Court of legal principles to the facts, the taxpayer merely contends that the Tax Court should have reached a different conclusion

on the evidence. Stated in its ultimate terms, the taxpayer's contention is that, instead of finding that the transfers were motivated by a purpose to make gifts in lieu of a testamentary disposition, it should have found that they were motivated solely by life purposes.

As regards the gifts to Ralph, the taxpayer contends (Br. 12–16) that the Tax Court should have found that these were motivated solely by a purpose to assure him an education at Stanford University, against the opposition of Ralph's father and stepmother, and to that end (Br. 13), in the language attributed to the decedent by his lawyer Johnston, "to fix it so the boy would be absolutely independent and that his father or his stepmother would have nothing to do with the boy's business." The taxpayer is concerned to establish this as the decedent's sole motive for the gifts to Ralph, for he contents himself with claiming (Br. 16) that, with this motive established, the gifts to George are seen to be made merely in order to equalize the ones to Ralph. Aside from the provisions of the will, this contention is based upon the following testimony of George (R. 159):

> Q. Did you at that time [December 20, 1938, when the decedent declared the trust for Ralph] receive securities for yourself?
>
> A. Yes. And my father said to me "Now, George, I want you to take the same comparable amount for yourself." Which I did. But there is a difference of $290.00 there, and ninety-eight cents. And that was in the market value of some bonds.

An additional motive for the gifts to George is, however, assigned (Br. 17), namely, that "the decedent had followed a liberal policy of making gifts to his son."

The taxpayer's final contention is—a whole subsection of the brief being devoted to its elaboration (Br. 22–35)—that the decedent's mental and physical condition negatives the idea that the thought of death motivated the transfers.

Contrary to the taxpayer's assertion (Br. 10), the Tax Court did not disregard the statements which the decedent's attorney and George attributed to the decedent regarding his reasons for making the gifts. It is true, as the taxpayer infers (*loc. cit.*), that the Tax Court gave the alleged reasons no probative force, if by that is meant that the Tax Court did not regard them as the direct motive or motives for the transfers and therefore did not give them force and effect as such. For the Tax Court concluded (R. 37) that "the time and manner in which the transfers were made indicate that they were substitutes for testamentary dispositions of decedent's property," pointing out, in this connection (R. 38), that it was a significant fact in making the gifts that the decedent followed the ~~intended expression of~~ his will of dividing his property *per stirpes*. But this is not to say, as the taxpayer does (Br. 10), that thereby the Tax Court necessarily impugned the veracity of the decedent or, if it did, that it did so without justification. For, in reaching the conclusion it did, the Tax Court examined in detail (R. 38–39) the contentions made by the taxpayer and

the evidence relied on that the gifts to Ralph were motivated solely by a desire to insure him an education at Stanford University and (R. 39–40) those to George solely by a desire to give him amounts equal to those given to Ralph and of carrying out a long standing policy of making liberal gifts to George.

As regards the alleged motive for the gifts to Ralph, the Tax Court obviously did not take the position that the decedent did not make the statements attributed to him by his attorney and son, for the Tax Court in its opinion said (R. 38):

> We do not doubt that decedent wanted Ralph to become "a good business man and not a fiddler," as some of the witnesses stated, and that his intention was to make Ralph "absolutely independent."

It was merely the Tax Court's view (*loc. cit.*) that this did not satisfactorily explain why the decedent should have advanced the time of enjoyment by Ralph of such a substantial portion of the property. In this connection, the Tax Court pointed out (R. 38–39) that the record was devoid of any intimation that the decedent was endeavoring to school his grandson in handling money, the inferences being to the contrary since the major portion of the property given Ralph was to be administered by his uncle as trustee, who was to pay out of its income only such amounts as he should deem necessary for Ralph's support, education, and maintenance. The Tax Court considered (R. 38–39) that, inasmuch as the trust created for Ralph was in essence the same as the trust which was to be set up after the decedent's death under the terms of his

will, it was difficult to see why it was created, if it were not for the reason which the Commisisoner had determined.[12]

As regards the taxpayer's contention that the gifts to George were motivated merely by a desire to equalize the gifts between Ralph and him, the Tax Court said (R. 39) such intention was also clearly evidenced by the terms of the decedent's will and the fact the decedent provided that each should receive approximately the same amount of his property when he made the gifts in December, 1938, and January, 1939, showed that there was no change in the plan and obviously did not explain the decedent's motive in advancing the time of the enjoyment of George's share of the property.

Turning to the other motive assigned for the gifts to George, namely, that these were made as a continuation of a long standing policy to make liberal gifts to him, it would seem that this reason is inconsistent with the first reason assigned therefor, that they were made to equalize gifts between Ralph and George. The policy of equalizing the gifts between Ralph and George obviously originated subsequent to the 1932 will, which,

---

[12] In a substantially similar situation, the District Court in *Land Title & Trust Co.* v. *McCaughn*, 7 F. Supp. 742, 744 (E. D. Pa.), said:

> Even assuming that it is the dominant or sole purpose, I can think of no reason which would require it to be carried out by a deed rather than by a will, unless it be that the donor mistrusts his own ability to take care of his property until his death and wishes to put it out of the way of dissipation by himself as well as his heirs. I am sure that no one would suggest that this was the case with Dr. MacFarlan.

it will be remembered, was the one that provided merely for a spendthrift trust for George. The policy to equalize gifts was first carried out in the 1935 will, although it appears from lawyer Johnston's testimony that the decedent had discussed his intention to make equal gifts to Ralph and George in 1933, 1934, and 1935. (R. 73.) But from 1935 to 1938 there was no policy to make gifts *inter vivos*. Of course, no such policy existed between 1930 and 1935. And, while there is an explanation why there was no policy to make *inter vivos* gifts between 1930 and 1935, namely, because of George's bankruptcy, there was no explanation why there was no such policy from 1935 to 1938. The only evidence we have as to the decedent's policy, or rather lack of policy, to make *inter vivos* gifts to George and Ralph between the date of the execution of his 1935 will and the date of the 1938 gifts is the fact that he made no such gifts to them between those dates (except that he gave $500 to Ralph to start him in Stanford University), but only a codicil to his will. Such continuity of a purpose to make gifts to George as may have existed up to 1930 was therefore clearly broken not only by George's bankruptcy, but by the fact that Relph came into the picture as an equal subject of the taxpayer's bounty. In any event, the motive now attributed by the taxpayer to the decedent of making the gifts to Ralph—which carried the contemporaneous gifts to George in their wake—had nothing whatsoever to do with the decedent's motive for the gifts made to George prior to 1930. Accordingly, the Tax Court concluded—correctly, we think—that the gifts to George in 1938 and 1939 could not be attributed to a long

continued policy or practice, but that they, like the gifts to Ralph, appeared rather to have been made as substitutes for and in lieu of testamentary disposition of his property. (R. 39–40.)

Clearly, the Tax Court was not bound to base its ultimate finding solely on the testimony of the decedent's attorney Johnston and his son George regarding the statements which the decedent had made as to the reasons why he was making the gifts. Indeed, the trier of the fact is never bound by the declaration of a purpose made by the interested party, but is free to find from all the facts what the real intention was. See *Helvering* v. *Nat. Grocery Co., supra,* p. 295; *Helvering* v. *Stock Yards Co., supra,* p. 707; *Rand* v. *Helvering,* 77 F. 2d 450, 450 (C. C. A. 8th); *United States* v. *Washington Dehydrated Food Co.,* 89 F. 2d 606, 609 (C. C. A. 8th). The Tax Court is well aware of this principle and has again and again been guided by it, often with the approval of the courts. See, e. g., *William C. DeMille Productions, Inc.,* v. *Commissioner,* 30 B. T. A. 826, 829; *Reynard Corp* v. *Commissioner,* 37 B. T. A. 552, 563; *R. L. Blaffer & Co.* v. *Commissioner,* 37 B. T. A. 851, 856, affirmed, 103 F. 2d 487 (C. C. A. 5th), certiorari denied, 308 U. S. 576, rehearing denied, 308 U. S. 635; *W. S. Farish & Co.* v. *Commissioner,* 38 B. T. A. 150, 158, affirmed, 104 F. 2d 833 (C. C. A. 5th); *Shoenberg* v. *Commissioner,* 30 B. T. A., 659, 661, affirmed, 77 F. 2d 446 (C. C. A. 8th), certiorari denied, 296 U. S. 586; *Seymour* v. *Commissioner,* 27 B. T. A. 403, 405; *Powell* v. *Commissioner,* 34 B. T. A. 655, 659.

It is, moreover, wholly immaterial that the Tax Court did not say in so many words that it did not believe the decedent's declarations of purpose in making the gifts to Ralph, if the decedent thereby intended to be understood as implying that he did not intend to make the transfers as a substitute for testamentary dispositions. It was unnecessary for the Tax Court to state that it did not believe the decedent in his declarations of purpose if such was their purport. To say, as the Tax Court did, that the testimony was not satisfactory, or that it did not satisfactorily explain why the decedent should have advanced the time of enjoyment by Ralph of such a substantial portion of the property (R. 38), is more polite and less offensive, and at the same time equally sufficient. *Stone* v. *United States,* 164 U. S. 380, 382.

Furthermore, as the Tax Court said (R. 41), the decedent quite obviously was tax conscious, as was indicated by the fact that he deliberately divided the gifts between 1938 and 1939 in order to minimize his tax liability. See George's testimony. (R. 162.)

It follows that the evidence of the decedent's statements regarding his intentions does not necessarily render irrational a conclusion based upon all the evidence that the transfers were made in contemplation of death. Proof of that is more often than not to be found in the character of the gifts and the circumstances surrounding them—and that is precisely the case here.

The decedent was a man of advanced age. He was 84 years old and was suffering from an incurable disability, the result of an accident sustained several

years before. He was retired. His wife had died some years before and his only daughter had died in childbirth. Her only child, a boy, Ralph, had lived with and been brought up by the decedent and his wife. A number of years before his death, the decedent had determined to leave his property in equal shares to his son George and his grandson Ralph. To carry out that purpose, the decedent had made a will in 1935 giving George one-half of his property outright and placing the balance in trust for Ralph, providing that the income be used for his maintenance and education until the last of the corpus was distributed to him at 35. About three years later, ostensibly in order to provide a college education for Ralph (which decedent could himself have provided until his death and which he had thereafter provided for as effectively by his will), and to do so in such fashion that neither his father who had remarried nor his stepmother could get his hands on it (although they could no more have done so had the transfer not been made and the property been left to pass under the decedent's will), the decedent in 1938 transferred in trust for Ralph property valued at $79,000. At the same time, the decedent made a similar gift to George outright. Some time before that, in the spring of the same year, the decedent had had a paralytic stroke, the result of a fall in the bathroom. He was prone to fall because of the weakened condition in which the accident already mentioned had left his right hip and leg. Within a month after the December, 1938, transfers, that is, some time in January, 1939, the decedent made an additional gift

outright to each of about $23,000. The reason given for making these gifts in 1939 instead of including them in the 1938 gifts is that he could thereby make a tax saving. At the same time he gave his automobile to Ralph. Altogether, these gifts aggregated some $240,000 and represented more than 60 per cent of the decedent's estate, so that only about $142,000 passed under the terms of his will. The decedent died in June, 1940, of a hemorrhage in the region of his old injury, apparently resulting from another fall.

We submit that it can not be said that there is no evidence to support a finding that these transfers were made "in contemplation of death." This is, of course, not to say that this Court need agree with the finding. But it is not concerned with what it may regard as an error of fact on the part of the Tax Court, although we think that none such has been committed by it. This Court must uphold the decision of the Tax Court upon the point in issue, even though, if privileged to indulge in its own inferences, its conclusions would controvert those of the Tax Court. *McGrew's Estate* v. *Commissioner, supra,* p. 162. It has no right to substitute its own judgment upon the facts for the finding of the trier of the facts so long as the findings are not inconsistent with the evidence and do not lack support in substantial evidence. *Flack* v. *Holtegel, supra,* p. 515. A finding of fact by the trier of the facts, if based upon substantial evidence, is not to be set aside upon appeal, even if upon examination of the evidence the court might draw a different inference. *Smails* v. *O'Malley, supra,* p. 412. There the

court also stated that on motion for directed verdict by any party (which presents the identical question presented on appeal), the court is required to consider the substantial evidence and all the inferences reasonably to be drawn therefrom in the light most favorable to the other party and, if fair-minded men may draw different inferences from such evidence, the question is one of fact for the jury (or judge sitting without a jury, or the Tax Court) and not one of law for the court.

Little need be said with respect to the taxpayer's somewhat extended argument as to the decedent's good health and cheerful disposition. (Br. 21–35.) To be sure the Tax Court did not take quite the taxpayer's view thereof. However, even if it had taken the same view, it would have availed the taxpayer nothing here. The decedent may have contemplated his death in the statutory sense even though he was in excellent health and did not apprehend death as imminent. As we have heretofore said, this was precisely the situation in *McCaughn* v. *Real Estate Co., supra.* In that case the Supreme Court stated that the District Court, in referring to the decedent's physical condition, had said the evidence showed that, at the time of the transfer, the decedent was 78 years old, unusually vigorous and clear minded and, except for a condition common in men of his age, in good health, and that the most that could be claimed for the evidence was that it established, as the District Court had specifically found (p. 607), that the transfer was not made "under any consciousness or apprehension that death was imminent."

It is therefore respectfully submitted that there is no basis upon which this Court can interfere with the finding of the Tax Court that the transfers in question were made in contemplation of death.

II

The value of the property transferred by the decedent in trust for the benefit of his grandson Ralph was also includible in the decedent's gross estate because he had reserved the power to alter, amend, revoke, or terminate the trust

Section 811 (d) (1) of the Internal Revenue Code (Appendix, *infra*) provides that there shall be included in the gross estate the value of property to the extent of any interest therein of which the decedent has at any time made a transfer without adequate and full consideration, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to a change through the exercise by the decedent of a power to alter, amend, revoke, or terminate, *without regard to when or from what source the decedent acquired such power.* The italicized words were added to the section by way of an amendment to the prior law by Section 805 (a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648. Their significance is hereafter explained. In answering the taxpayer's contention, we shall first assume, as apparently he did, that no significance is to be attached to them here.

The Commissioner had determined that the transfer in trust for the benefit of the decedent's grandson Ralph, made December 20, 1938, of property of the value of $79,001.53, being a part of the property he

had held includible therein under Section 811 (c), was also includible in the gross estate because the transfer was subject at the date of the decedent's death to a power of revocation. The Tax Court did not decide the question whether this transfer was likewise includible therein under Section 811 (d) (1). It did no more than refer to the Commissioner's determination in respect thereof. (R. 25.) That it did not decide the question is undoubtedly due to the fact that it sustained the inclusion of the value of all the 1938 and 1939 transfers because it considered they were made in contemplation of death, within the purview of Section 811 (c). The Tax Court did, however, make a finding that (R. 29):

> No power to change, alter, or amend the trust was reserved in the settler.

Presumably, this meant merely to say that no such power was "expressly" reserved, and not that the power to revoke did not exist, for it did exist under Section 2280 of the Civil Code of California, and that section was no doubt called to its attention. This section provides that, unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. But, if the section was not called to the Tax Court's attention, and it meant to say that the transfer was not subject to revocation at the date of the decedent's death, then the finding is obviously in error; for, by the instrument creating the trust, it was not expressly made irrevocable as required by Section 2280. That suffices to bring the

transfer within the statute. It is not necessary that the power of revocation be expressly reserved.

The provisions of Section 811 (d) of the Internal Revenue Code were first enacted as Section 302 (d) of the Revenue Act of 1924. In explaining the provision H. Rep. No. 179, 68th Cong., 1st Sess., p. 28, (1939–1 Cum. Bull (Part 2) 241, 261) said:

> By this subdivision if the decedent had the power at the time of his death to change the enjoyment of a property interest, which he had transferred, or with respect to which he had created a trust, such interest is to be included for estate-tax purposes in his gross estate. Likewise, if the decedent had relinquished such a power in contemplation of death, except by a sale for a fair consideration, the property interest over which he had such a power is to be included in his gross estate.
>
> Even though the decedent has made the transfers specified in this subdivision, he has retained substantial control over the disposition of the property, through the power to change the enjoyment thereof. Such property interests should therefore fairly be taxed as part of the decedent's estate, particularly since, by virtue of his death, the substantial interest which he had has been wiped out, and to the same extent the property interest of the legal title holder, his transferee, has been increased. This provision is in accord with the principle of section 219 (g) of the bill which taxes to the grantor the income of a revocable trust.

The same explanation will be found in S. Rep. No. 398, same Congress and Session, pp. 34–35 (1939–1 Cum. Bull. (Part 2) 266, 289).

There is, therefore, nothing in the statute, even as it existed prior to the 1936 amendment, or in its legislative history, to indicate that a power of revocation must be expressly reserved in order to come within the ambit of this section. Moreover, speaking with reference to the statute levying a gift tax, the Supreme Court in *Burnet* v. *Guggenheim,* 288 U. S. 280, 286, said:

> It [the statute] is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall.

We think this clearly means to say actually beyond recall, regardless of the manner in which it is so placed.

Here the gift was *not* beyond recall because the decedent had not renounced the power to recall it. It would, therefore, seem that, under the *Guggenheim* case, a gift tax could not have been imposed in respect of the transfer, at least not until the power to revoke was released. Not having been released, it was taxable at death. The Board of Tax Appeals has expressly so held in the case of *Keiffer* v. *Commissioner,* 44 B. T. A. 1265, a case arising under Section 302 (d) (1) of the Revenue Act of 1926, as amended by Section 401 of the Revenue Act of 1934. In a lucid opinion in which the applicable authorities are reviewed, the Board cited, among others, its own decision in *Allen* v. *Commissioner,* 38 B. T. A. 871, upon which the taxpayer relies (Br. 36), but which, as the Board pointed out, had been overruled by the Circuit Court of Appeals for the Third Circuit in *Commissioner* v. *Allen,* 108 F. 2d 961, certiorari denied, 309

U. S. 680. In that case the Board had held that a gift in trust absolute on its face, made by an infant, was not subject to the gift tax after he had attained majority, since Section 501 (c) of the Revenue Act of 1932 applied to a power to revest *retained* in the trust instrument and not to the right given by law to infants to avoid their gifts. The Board there, as the taxpayer here, relied upon the distinction made by the Supreme Court in *Helvering* v. *Helmholz,* 296 U. S. 93, between a power to revoke and a condition which the law imposed. But, as the Circuit Court of Appeals for the Third Circuit pointed out in its opinion reversing the Board (pp. 964–965), the *Helmholz* case actually dealt with an entirely different situation and problem. The trust there was created in 1918. When the decedent died in 1926, the Revenue Act of 1926 was in effect, Section 302 (d) of which provided for the inclusion in the gross estate of the value of a transfer, whether in trust or otherwise, wherein the enjoyment was subject at the date of death to any change through the exercise of a power, either by the decedent alone or with any other person, to alter, amend or revoke. The donor had reserved no power to revoke the instrument, but it was therein provided that the trust should terminate if all the beneficiaries, including the donor, delivered a writing to the trustee signed by all declaring such purpose. The court said that such power of revocation was not one contemplated by the statute; that the contention that it was overlooked the essential difference between a power to revoke, alter or amend and a condition which the law imposed, namely that imposed by the general rule that

all parties in interest may terminate a trust. In other words, as the Circuit Court of Appeals for the Third Circuit pointed out (*loc. cit.*) the power came to her as one of the beneficiaries and not as the settlor. But we are not here dealing with a general rule that all beneficiaries acting conjointly may revoke a trust; we are dealing with a power vested in the decedent alone by reason of his failure to make the transfer expressly irrevocable, as he was required by state statute to do if he wished to make it irrevocable. The Board also referred to the decision of this Court in *Hughes* v. *Commissioner,* 104 F. 2d 144, the rationale of which appears to sustain the Board's view.

Nor is the case of *White* v. *Poor,* 296 U. S. 98, upon which the taxpayer also relies, in point here. That case was also distinguished by the Circuit Court of Appeals for the Third Circuit in the *Allen* case, *supra, loc. cit.* There the trustor had designated herself and two others as trustees with power to terminate the trust. She had reserved no power to revoke. The trustor had resigned as a trustee, but upon the resignation of her successor had been appointed as one of the trustees. The court held that the power acquired by her as a result of such appointment was not one which could be said to have been reserved by her, assuming that she had originally reserved it as a trustee designated under the trust. Incidentally, speaking of the decision of this Court in *Hughes* v. *Commissioner, supra,* which the taxpayer says contains merely an *obiter dictum* against his contention, the Circuit Court of Appeals for the Third Circuit in *Commissioner* v. *Allen, supra,* said (pp. 965–966):

> It is implicit in the case of *Hughes* v. *Commissioner*, 9 Cir., 104 F. 2d 144, that a power to revoke a transfer in trust, arising by operation of law, comes within the purview of Section 501 (a) and (c) of the Revenue Act of 1932. In that case, other than for the settlor's power to revoke which was imposed by a California statute, the transfer was complete and irrevocable as a gift, no power to revoke having been reserved by the settlor in his trust indenture. Under the law of Massachusetts the trust was irrevocable. The court held that the law of Massachusetts (the situs of the trust) governed in determining when the transfer became consummate as a gift. Nonetheless, the implication of the court's reasoning is plain. If the law of California (the domicile of the settlor) had governed, the effect of the statutorily imposed power of revocation in California would have been to suspend the taxability of the transfer, as a gift, until the power, which the law there imposed, had been extinguished or terminated.

We think that is a correct estimate of the decision.

Of the remaining three cases cited by the taxpayer in support of his contention (Br. 39), only *Newhall* v. *Casey*, 18 F. 2d 447 (Mass.), and the decision of this Court in *United States* v. *Goodyear*, 99 F. 2d 523, require any consideration. The *Newhall* case arose under the Revenue Act of 1916, which did not contain the provisions here in question. The question there was whether a gift by a Massachusetts husband to his wife came within the purview of the "to take effect at death" provisions of Section 202 (b) of the Revenue Act of 1916. It appears that under what the

court called a peculiar doctrine which had survived in Massachusetts longer than elsewhere, and had since been abolished by statute, a gift by a husband to his wife remained revocable and subject to the claims of his creditors until his death. The court held that, despite this, it was not includible in the decedent's gross estate. Aside from the fact that the case did not arise under similar provisions of the statute here under consideration, but as we have said, under the "to take effect at death" provision, the power to revoke under the rule stated was absolute. It was not, as here, left to the donor's discretion whether the transfer should be revocable or not. Hence, if the transfer there was not to be regarded as a gift, the husband could not make a gift at all. In any event, it is not to be regarded as supporting the taxpayer's contention here. The case has, moreover, been cited only once and that in an income tax case. *Walker* v. *Commissioner,* 6 B. T. A. 1142, 1151. This case involved the question whether a donation by a husband to his wife of an interest in an oil and gas lease, constituting Louisiana community property, vested in the wife the husband's interest therein so that the gain from subsequent sale thereof was taxable to her despite the fact that under Louisiana law the gift was revocable until death. The Board held that the gain was nevertheless taxable to her. Incidentally, the *Walker* case has itself never been cited as an authority for that proposition. And this brings us to a consideration of the decision of this Court in *United States* v. *Goodyear, supra.*

But the situation in that case is not at all comparable to that presented here. While that case involved an assignment by a husband to his wife of his interest in community property acquired before the 1927 amendment of the Civil Code of California, the value of the property transferred was held not to be includible in his gross estate under Section 302 (d) merely because he retained the rights of management and control under the statute. The *ratio decidendi* of the majority opinion is that the husband did not retain possession or enjoyment of the property until his death merely because, in virtue of the statute, he retained the management and control thereof until his death. The court pointed out that any disposition of the property which the husband might have made must have been with his wife's consent and for a valuable consideration. It was, however, the view of Judge Stevens who dissented that under California law the husband did retain the power to "alter" the corpus of the transferred property in several important respects, some without the consent of his wife and some only with her consent, and that this fitted directly into the provisions of Section 302 (d) of the 1926 Act. Obviously, if the majority of the court had agreed with this construction of the California statute, it would not have arrived at the conclusion it did.

So far, we have assumed that the words which were added to Section 302 (d) (1) of the Revenue Act of 1926, as amended, by Section 805 of the Revenue Act of 1936, set out in the opening paragraph of this point of our argument, had no significance here. These words qualify the power of revocation and provide

that the value of property subject to such power shall be included in the gross estate "without regard to when or from what source the decedent acquired such power." This assumption is, however, erroneous, for the amendment was intended to be declaratory of existing law, except in so far as situations similar to those involved in *White* v. *Poor, supra,* were concerned. It is to this end that subdivision (b) of Section 805 of the 1936 Act provided:

> Except in the case of transfers made after the date of the enactment of this Act, no interest of the decedent of which he has made a transfer shall be included in the gross estate under such section 302 (d) (1) unless it was includible under such section before its amendment by this section.[13]

Thus, in short, the primary purpose of the amendment was to cancel the effect of the decision of the Supreme Court in *White* v. *Poor, supra.* This is made entirely clear by its legislative history.

The amendment was first inserted in H. R. 12,793, 74th Cong., 2d Sess., which is not the Revenue Bill of 1936. The Revenue Bill of 1936 was H. R. 12,395 74th Cong., 2d Sess. H. R. 12,793 was a bill to amend the administrative provisions of the internal revenue laws, and dealt primarily with refunds of amounts

---

[13] Compare subdivision (b) of Section 805, as quoted in the text, with the language as it appeared in the bill as it passed the Senate, subdivision (b) of Section 807, which is as follows:

> The amendment by subsection (a) of this section shall not apply to decedents dying prior to the date of the enactment of this Act.

collected under the Agricultural Adjustment Act. It also contained, however, certain miscellaneous amendments to the revenue acts, among which was Section 206. This section amended Section 302 (d) (1) of the Revenue Act of 1926, as amended. The last form of the bill was the form in which it was reported to the House. Its provisions were then, for the first time, incorporated in the Revenue Bill of 1936 (H. R. 12,793), namely by way of an amendment made to the bill on the floor of the Senate. See 80 Cong. Record, Part 8, p. 9073. It appeared in that bill as Section 807, and is known as the Walsh Amendment. This section in its turn, became Section 805 in conference, the section being then amended, but apparently only in order to clarify its language.[14] The amendment made in conference, however, was not explained in the conference report on the bill. See H. Conference

---

[14] Section 807 (a) of the Revenue Bill of 1936 (H. R. 12,395) as it passed the Senate, reads as follows, amendments made by the Senate in Section 206 of H. R. 12,793, being shown in stricken-through type and italics:

SEC. 807. ESTATE TAXES—REVOCABLE TRANSFERS.

(a) Section 302 (d) (1) of the Revenue Act of 1926, as amended, is amended to read as follows:

(d) (1) To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (whether created at the time of such transfer or thereafter arising from any source, and whether exercisable in an individual or representative capacity) by the decedent ~~alone~~ *or by any other person* or by the decedent in conjunction with any ~~other~~ person, to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death.

Rep. No. 3068, 74th Cong., 2d Sess., where at page 11 it is merely noted that the Senate agreed to the conference amendment of the amendment. Hence, the only explanation of the amendment (aside from a meager explanation made of it by Senator Walsh at the time he introduced the amendment as Section 807 of the Revenue Bill of 1936)[15] was made by Section 206 of H. R. 12,793 and is that found in H. Rep. No. 2818, same Congress and Session, at page 9 as follows:

> Section 206 amends section 302 (d) (1) of the Revenue Act of 1926, as amended, relating to the inclusion in the gross estate of a decedent of the value of property, transferred by him by trust or otherwise, but subject to a power to alter, amend, or revoke. The changes made by this section are made necessary largely by reason of the decision of the United States Supreme Court in the case of *White* v. *Poor* (296 U. S. 98). Although in that case the decedent had created a trust which was at her death subject to a power to terminate, existing in the decedent as trustee in conjunction with two other trustees, nevertheless the Supreme Court held that section 302 (d) did not require the inclusion, in the gross estate of the dece-

---

[15] Senator Walsh's explanation is as follows (80 Cong. Record, Part 8, p. 9073):

> Mr. WALSH. Mr. President, the purpose of this amendment is to clarify the revocable-trust provisions of the present law, which threaten a large loss of revenue to the Government. It is estimated that this amendment would save the Government as much as $20,000,000 a year.
>
> Mr. TYDINGS. Does the amendment apply ex post facto?
>
> Mr. WALSH. No.
>
> Mr. TYDINGS. Just from now on?
>
> Mr. WALSH. From now on.

> dent of the property subject to such power of termination. The Court held that the power to terminate existing in the decedent at the date of her death resulted from the action of the other trustees and not by virtue of any power reserved to herself as settlor in the original estate. The case, therefore, suggests that section 302 (d) may be circumvented in many ways so long as the power to alter, amend, revoke, or terminate does not accrue to the settlor by virtue of the reservation in the trust instrument. It is, therefore, provided that section 302 (d) covers a power whether created at the time of transfer or thereafter arising from any source and whether exercisable in an individual or representative capacity. To some extent, it is believed this amendment is declaratory of existing law.

Accordingly, the Board in the *Keiffer* case, correctly, we think, regarded the amendment as purely declaratory so far as the issue there was concerned, and that means, of course, so far as the issue here is concerned. Cf. Section 81.20 of Treasury Regulations 105, promulgated under Section 811 (d) (1) of the Internal Revenue Code (Appendix, *infra*), which considers the amendment as merely declaratory of the meaning of the subdivision prior to the amendment.

If, however, this is a mistaken view, then nothing could be clearer than that the amendment prospectively applies to the situation here, as well as to situations similar to that in *White* v. *Poor, supra.*

It is therefore respectfully submitted that the value of the property transferred by the decedent in trust for the benefit of Ralph on December 20, 1938, is also

includible in the decedent's gross estate under Section 811 (c) (1) of the Internal Revenue Code.

CONCLUSION

For the reasons stated, the decision of the Tax Court should be affirmed.

Respectfully submitted,

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
CARLTON FOX,
Special Assistants to the Attorney General.

JANUARY, 1944.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States

*   *   *   *   *

(c) *Transfers in contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

(d) *Revocable transfers—*

(1) *Transfers after June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

* * * * *

(26 U. S. C. 1940 ed., Sec. 811.)

Civil Code of California (1937), Deering, c. 2, Art. 5;

§ 2280. ***Revocation** of trusts.* Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. Trusts created prior to the date when this act shall become a law shall not be affected hereby. (Enacted 1872; Amended by Stats. 1931, p. 1955.)

Treasury Regulations 105 (relating to the estate tax under the Internal Revenue Code):

Sec. 81.16. *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth,

must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

Any transfer without an adequate and full consideration in money or money's worth, made by the decedent within two years of his death, of a material part of his property in the nature of a final disposition or distribution thereof, is, unless shown to the contrary, deemed to have been made in contemplation of death.

If the executor contends that the value of a transfer of $5,000 or more made by the decedent subsequent to September 8, 1916, should not be included in the gross estate because he considers that such transfer was not made in contemplation of death, he should file sworn statements with the return, in duplicate, of all the material facts and circumstances, including those directly or indirectly indicating the decedent's motive in making the transfer and his mental and physical condition at that time, and one copy of the death certificate.

The fact that a gift was made as an advancement to be taken into account upon the final distribution of the decedent's estate is not, in and of itself, determinative of its taxability. (See section 81.15.)

*   *   *   *   *

SEC. 81.20. *Transfers with power to change the enjoyment.*—(a) *Transfers included.*—Subsection (d) of section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See section 81.15.)

The addition to subdivision (d) (1) of the Revenue Act of 1926, by section 805 of the Revenue Act of 1936, of the phrase to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent (which phrase is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code), is considered merely declaratory of the meaning of the subdivision prior to the addition of the phrase.

The second phrase added to this subdivision of the Revenue Act of 1926 by amendment in 1936 (also embodied in section 811 (d) (1) of the Internal Revenue Code), namely, "without regard to when or from what source the decedent acquired such power," is not considered declaratory of the meaning of the subdivision prior to the amendment in a case in which no one of the powers enumerated in the subdivision was reserved at the time of the making of the transfer, but one or more thereof were conferred subsequent thereto (whatever the source

from which conferred) without any understanding, expressed or implied, had in connection with the making of the transfer that such power or powers should be later conferred.

The third change made in the subdivision by the Revenue Act of 1936 (which is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke," Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."

U. S. GOVERNMENT PRINTING OFFICE: 1944